

July 2, 2018 First Delegated Legislation Committee Higher Education and Research Act 2017 (Cooperation and Information Sharing) Regulations 2018 (SI 2018, No. 607)

MPs laid an EDM and asked for debate on Statutory Instrument 607 / 2018.

- The SI 607 http://www.legislation.gov.uk/ukxi/2018/607/pdfs/ukxi_20180607_en.pdf
- Explanatory Notes (http://www.legislation.gov.uk/ukxi/2018/607/pdfs/ukxiem_20180607_en.pdf)
- The Higher Education and Research Act (s63) <http://www.legislation.gov.uk/ukpga/2017/29/section/63/enacted>
- Securing student success: [risk-based regulation for teaching excellence, social mobility and informed choice in higher education \[p1333-137\]](#)

Call to annul the Statutory Instrument 607 / 2018

1. Just weeks after making a fanfare about the [new UK Data Protection Act 2018](#), supposed to give people more control over their data and how it is used, the government has passed a new law that rides roughshod over students' data rights.
2. Rushed through Parliament in three weeks including the Whit Recess, the SI went without scrutiny before it came into effect; and without data protection impact assessment or human rights assessment which would have included privacy. The significance of the data volume and sensitivity should require this assessment before the powers are conferred in law.
3. The decision-making between stakeholders (the DfE and prescribed persons) has not been made available by the Department, preventing scrutiny of the policy intent decided among stakeholders themselves behind closed doors, according to the Explanatory Notes (8.1).
4. The collaboration agreements have not yet been published and there are no plans to publish the data sharing agreements, as confirmed in parliamentary [Written Question 156351](#).
5. Data sharing agreements made in secret with DfE do not have a recent good track record. The data sharing agreements made in secret in July 2015 were only discovered by civil society campaigners, who had to fight for its release for six months, before it revealed the monthly arrangement that still continues, sharing children's names, home address, gender and date of birth for the purposes of immigration enforcement and to specifically support the Hostile Environment.¹ There is low level of trust in how the Department uses such personal data².
6. To preserve public and professional trust, use of personal data from the sector must be transparent and safe, and alert to the future. Third party prescribed persons must be prevented from scope creep of using their data in future in ways not foreseen and not limited under the SI.
7. If safeguards are not on a statutory footing, what value has any assurance, that the use of potentially named records will not change at the whim of policy or by a future government?
8. It is unclear if this is necessary to create a new and very broad legal basis for the purposes of data sharing, compared with say contract, or if the Department seeks to legitimise existing data sharing practices around denial of funding, which may have previously avoided scrutiny.

¹ <http://defenddigitalme.com/2018/06/schools-must-no-longer-request-pupil-nationality-data/>

² Teachers' union passes motion at annual conference challenging government's use of data collected by state schools in England The Guardian, April 2017 <https://www.theguardian.com/education/2017/apr/17/nut-to-tell-parents-not-to-give-details-of-childrens-nationality-and-birthplace>

Suggested improvements to The Statutory Instrument

9. Annul and revise the SI to be written with safeguards put in place for students and staff personal data from use beyond the narrow intended purposes of the SI.
10. The purposes should be explicit, necessary and proportionate, with each regards to their capacity — for example Pearson as a provider of HNC and HND exams, specify why the weights and measures (trading standards) body will receive which information and why.
11. The Student Loans Company and HMRC purposes similarly should be explicit, narrow and set out necessity. For example if these are for direct administrative purposes or other uses.
12. Define “the information” that may be shared, and set its boundaries to prevent scope creep.
13. The direction of information flows should be transparent and define what will be shared, where.
14. The Explanatory Notes say that no statement is required regards the European Convention on Human Rights. This should be carried out now, to ensure the integrity of the Instrument and prevent any unpredicted risks to the reputational risk to the prescribed persons, and to the students and staff whose data the transfers involve.
15. A requirement should be set out for
 - (a) data sharing agreements must be published by all stakeholders with change notifications.
 - (b) A Transparency Register to document any data sharing, as is at the DfE for pupil data distribution and access, with brief explanations in plain English.
 - (c) Communication for students and staff must be set out up front in an explicit privacy policy.
 - (d) Clear restriction on the transfer of historical data (for which this legal basis will not apply)

Questions

16. Why precisely will HMRC and the Student Loans Company have access to identifying personal data (without safeguards for anonymity), via the OfS through these powers, rather than direct relationships with individuals, and with what transparency and oversight?
17. If information may be passed from the OfS to Pearson, without limitation, it could present preferential treatment and enormous commercial competitive advantage over other companies. How will the government prevent this in practice, having passed the SI, now, or in future?
18. The powers in the information duties of [Clause 64 of the Act](#), permit the bodies to share data with the government, the Secretary of State for Education. Will these data be passed over *from* Pearson for example, *to* other government departments and if so, which?
19. What are the boundaries of “the information”? These must be set out in the legislation.
20. Does data sharing use include the intent to deny any students who live in England access to higher education and / or student loan funding? In particular those who may have been born or have lived in the UK all their lives, yet find themselves excluded, treated as foreign nationals.
21. Why has there been no human rights assessment of the parent legislation and therefore measure of its privacy implications of this power with little limitation? [The Explanatory Notes \(10.4\)](#)³ state that the department has put the onus on the OfS or any privacy impact assessment — *but the OfS will NOT necessarily be the data controller for the data to be transferred*. The data transfers are not limited in one direction — but may share population-wide student and workforce personal data from and to, these third parties.

³ Explanatory Notes to SI 607/ 2018 <https://bit.ly/2KvtHZg>

22. The data controllers might be the companies, the prescribed persons, and not the OfS. Is it therefore appropriate to leave the data protection assessment to the OfS and not require now.
23. If the OfS is supposed to regulate the significant budget that Pearson-approved course providers receive from the public purse for HNC and HND courses, how will the OfS [Chair](#) avoid being seen to have a potential conflict of interest in protecting Pearson's reputation and be seen to offer independent regulation? The Chair of the OfS Michael Barber was Chief Education Adviser at Pearson for 6 years before taking on the OfS role. There has been zero scrutiny of the details of this data sharing, zero duty to transparency, there are no obligations on FOI, or limitations on future data uses and scope creep in secret.

Risks

Removes respect for rights

24. The hollowness of government promises made about giving us control of our personal data in the new UK Data Protection Act and GDPR are reflected in this Statutory Instrument .
25. [90% of 37,000 student asked in a 2015 UCAS survey](#) said they want their personal data to be handed to commercial companies only with consent. This SI however permits data to be passed over to commercial company Pearson for use, under its very broad company articles.
26. Students won't have any control over the personal data they share with their course provider or during their application process and their data will be handed over without their consent.
27. Unidentified and unaccountable people at the controversial Office for Students will decide why students' (and staff) data may shared, when and how.

Definition of purposes and clear proportionate need for the powers is missing

28. For certain prescribed bodies, the Regulations refer to the company's Memorandum and Articles of Association. In those cases the relevant functions are the functions of the company pursuant to its objects, which are set out in its Memorandum and Articles of Association.⁴ These are much more extensive than are included in the Explanatory Notes which mention only page 1, and fail to include the other three pages, and include marketing:
i) To promote or concur in the promotion of any company, the promotion of which should be considered desirable.
29. Pearson says this is about fraud prevention⁵, and preventing access to students who are not entitled to funding (whether course providers drawing down funding or as individuals in Student Loans). Are the young people who have lived their whole life in Britain, who find themselves [denied access to Higher Education](#)⁶ really committing "fraud"? There are great risks their data will be used for this, and if considered under immigration enforcement purposes, they will have no recourse for Home Office errors, given the [exemption in the Data Protection Act 2018](#).⁷
30. Is this power necessary and proportionate and balanced against risks? Where are the statistics on the volume of fraud cases? Even where today's assurances are accepted and use is for public interest purposes, it is an abdication of responsibility, to create powers without any rights assessment and before understanding its potential significant effects on young people's lives.

⁴ Pearson Articles extracted from Companies House June 29, 2018 <https://bit.ly/2KA045u>

⁵ <https://www.telegraph.co.uk/education/2018/06/18/university-students-data-shared-private-companies/>

⁶ <https://www.independent.co.uk/voices/data-protection-bill-immigration-home-office-privacy-intrusion-a8340826.html>

⁷ See Liberty briefing on the Data Protection Act exemption Schedule 2, paragraph 4 <https://bit.ly/2KAZfJN>

The effects of the powers conferred in the Statutory Instrument

31. Under section 63 the OfS is only be able to share information with another person or body for the purposes *of its own* statutory functions.
32. The regulations define the stakeholders with whom the OfS information disclosure powers under section 63 of the Higher Education and Research Act 2017 can operate by specifying *which* bodies and *for which of their functions*, “the information” (undefined) can be shared.
33. Section 63 means that regulations must refer to the organisation’s legal functions and powers. For government departments these are set out in legislation. But for commercial bodies such as Pearson, these are set out in the founding business documents and can be found at Companies House. For example, Pearson Education Limited’s objects are not limited to its work as an awarding body for HNC and HND qualifications and do not mention these qualifications at all. The articles include such broad purposes as, “promotion of any company”.
34. Giving the powers to the OfS that are so broad in purposes, is not aligned with the intentions of the General Data Protection regulation, and yet creates in conjunction with the Higher Education and Research Act, a very wide statutory gateway.
35. It should not be forgotten that the Higher Education and Research Act in 2017 created new powers for the Secretary of State for Education to require access to all applicants and students data, removing vertical data protection safeguards, that it would not otherwise have had in the same way before. Yet no data privacy impact assessment was done at that time either.
36. Although Pearson has given assurances, that in practice, the data sharing between itself and the OfS will far be more limited, it is poor practice to make such loose legislation without consequence.
37. **Case study:** In 2002, the then Labour government stated to collect children’s names in pupil data from schools, and gave assurances that these data would not be used for government purposes, other than for understanding learning outcomes, and academic research. Fast forward 15 years, and we discover the now government has created a data sharing agreement in secret between the DfE and the Home Office, for the purposes of immigration enforcement and to specifically support the Hostile Environment. Risk of scope creep and harm is very real.
38. The awarding bodies whose functions are not set out in legislation are:
 - a. Gateway Qualifications Company Limited (registered company 05502449) – the OfS’s powers of data sharing with GQC should be narrowed to be specific to the higher education qualifications that it awards.
 - b. Pearson Education Limited (registered company 00872828) – the OfS’s powers of data sharing here should be narrowed to be specific the HNC and HND qualifications it awards.
 - c. Vocational Training Charitable Trust (registered company 02050044) – the OfS’s powers of data sharing here should also be narrowed to be specific to the higher education qualifications that it awards.
39. Where personal data is shared between Pearson and the OfS, Pearson has suggested that it is for when its stakeholders have identified red flags, serious concerns such as fraud or malpractice by a provider or its students. And that data sharing is *from* Pearson *to* the OfS. Why is the data sharing agreement necessary and proportionate for that purpose?

40. The stakeholders include the Department for Education or other government departments or bodies, as well as the prescribed persons in the SI.
41. The Digital Economy Act 2016 Part 5, removed horizontal data sharing safeguards between such government departments or bodies which means that once data have been provided from students, via the Course Provider to Pearson, to the OfS, the data might be shared with any number of further bodies.
42. How is a student or staff member supposed to be able to understand where their personal data have been processed, which under the General Data Protection Regulation and new Data Protection Act 2018 is their right to know?
43. Indeed the reference in SI to the Data protection Act 1998 gives rise to think that the *rights of the individual*, which are more prominent under the new law, were given insufficient thought.

Student Loans Company

44. The OfS may also share personal data with the Student Loans Company about students accessing tuition fee and maintenance loans. Will the SLC share data with the OfS, and why?
45. The OfS could pass on special category data to others, for example on disabled students.
46. Sharing of those sensitive, special category data requires a higher bar under Article 6 and 9 of the General Data Protection regulation, which this SI has not considered at all.

Case Study: Denial of access to Higher Education funding and SL

47. Is the intention of this data sharing for Pearson to pass on student level data to the OfS who can then pass it on to others? Will Pearson and others be required to be out-posts of the Home Office for immigration enforcement purposes? In 2016 the BBC revealed the compromises that had to be negotiated with and agreed by Theresa May when she was Secretary of State at the Home Office <https://www.bbc.co.uk/news/uk-politics-38165395> and these included that:
48. *“prospective students applying to 16-19 institutions have their immigration status checked and are not allocated funding for a place, if they are not legally resident in this country.”*
49. Potential users were listed in 2017 consultation of the OfS, (pp133-137).⁸ It is unclear in this SI to what extent the data sharing is for the purposes of application of conditions for providers wishing to seek a Tier 4 licence.
50. A child is born in Britain to two Nigerian parents. The child does not know their parents' status is precarious and can find out that they are not British only when they are denied access to Higher Education. These young people, who were born and have lived their whole life in the UK, are not counted as home students for student loans purposes.
51. The 10 year route to settlement starting costs are £1,012 and the child needed to apply, before turning 18. But application for higher education, or for a Student Loan, can be the first time the child realises they are not British.
52. The then find themselves denied access to education and to student finance. Commonly no one thinks to ensure this earlier, especially for children in care. This is a very real issue for young people who want to study, apply to Britain's top universities, secure places and then find

⁸ https://consult.education.gov.uk/higher-education/higher-education-regulatory-framework/supporting_documents/HE%20reg%20framework%20condoc%20FINAL%202018%20October%20FINAL%20FINAL.pdf

themselves excluded due to a block on access to Student Loans and/or course funding.

53. Listen to young people tell the harm this causes in their own words through their campaign work LetUsLearn #younggiftedandblocked <https://www.youtube.com/watch?v=BumdwKTbyZQ>
<http://letuslearn.study/>

Government responses provided: Written Parliamentary Questions

54. Written question 156350

The purpose of Section 63(4) is to enable the Office for Students (OfS) to provide information to other specified bodies **for the purposes of their own important functions**, such as investigating fraud. **Section 63 does not place limitations on the type of information that may be provided, and therefore it could include personal data.**

55. Written Question 156351⁹

We understand that the OfS **will publish its collaboration agreements** with other bodies on its website and these will set out how the organisations will work together and **whether there is also a data sharing agreement in place.**

56. Written Question 156352¹⁰ The Office for Students (OfS) will be able to share personal data with Pearson in their capacity as an awarding body. It is anticipated that this data will **primarily be for the purposes of the assessment of the quality and standards** of the provider's provision or of **its propriety relating to genuine students being registered by providers** for the qualifications. When sharing this information the OfS is required to comply with data protection principles, and to have regard to its general duties under Section 2 of the Higher Education and Research Act 2017, including regulating providers in a transparent, accountable, proportionate and consistent manner.

Timeline of the Statutory Instrument and Higher Education Research Act

1. July 2, 2018 First Delegated Legislation Committee Higher Education and Research Act 2017 (Cooperation and Information Sharing) Regulations 2018 (SI 2018, No. 607)¹¹
2. June 26, 2018 Data Protection: Written questions 156350 -53
3. June 18 Statutory Instrument came into effect
4. [June 14](#), 2018 the Shadow Leader of the House of Commons, Valerie Vaz, asked for an annulment and [EDM debate](#) on a change of law in student data made via SI 607/2018.
5. May 23 Statutory Instrument Laid
6. 2017: Section 63 of the Higher Education and Research Act 2017, which contains the powers under which the regulations are made, underwent parliamentary scrutiny as a Bill before it received Royal Assent, but the concerns went unheard.
7. 2016: Gordon Marsden, Shadow Minister for Higher & Further Education and Skills, spoke about; **the risk to student data protection rights in the development of the Higher Education Act in October 2016:** <https://goo.gl/KkpDZQ> *"these clauses would give the state access to all university applicants' full data in perpetuity, for users who would only be defined as "researchers" and without "research" being defined at all; that might be capable of being changed under the direction of the Secretary of State."*

⁹ PQ 156351 <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2018-06-21/156351/>

¹⁰ PQ 156352 <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2018-06-21/156352/>

¹¹ Committee July 2 <https://calendar.parliament.uk/calendar/Commons/All/2018/7/2/Daily>